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No. 88-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE and SANDRA WEBB-BOOKER,

Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON and BETTY WHITE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents respectfully represent that there are no issues in this cause which would justify this Court's grant of a Writ of Certiorari herein.

STATEMENT OF THE CASE

Respondents, all of whom were senior nursing students at Chicago State University, a public institution, brought this suit claiming that the Defendants, Petitioners here, had deprived them of their property interests in continuing their professional education and pursuing their nursing careers without due process. They further alleged that these actions stigmatized them and substantially impaired their present and future employment opportunities.

The factual allegations of the Complaint stated that the final examination administered to them was invalid in that it did not pertain to the material actually covered in the course during the semester. They also complained that the final examination questions and scores were manipulated after the final examination had been given, that the evaluation of their academic performance was based upon factors not reasonably considered to be academic criteria, and that the individual defendants had intentionally falsified their clinical evaluations, as well as manipulating and altering quiz and examination grades throughout the fall trimester. They sought monetary and injunctive relief pursuant to 42 U.S.C. Section 1983.

In a second count, they claimed monetary relief under a state law cause of action. Petitioners timely filed their Motion to Dismiss, which was referred to a Magistrate for preliminary ruling.

The Magistrate recommended that the Board of Governors of State Colleges and Universities should be dismissed from the action. She further recommended that Count I should be dismissed to the extent that it sought monetary damages from the individual defendants, but

should continue as to those defendants in their official capacity insofar as it sought prospective injunctive relief. She further recommended that Count II of the Complaint, based upon pendent state grounds, be dismissed as to the individual defendants in their official capacities, but continue insofar as it sought monetary damages against defendants in their individual capacities.

Upon objections to this recommendation, the District Court purported to adopt the report and recommendation of the Magistrate, with a "clarification". That clarification held that Respondents had abandoned any claim against Petitioners in their official capacity. Based upon this finding, the District Court dismissed the claim for injunctive relief under Count I of the Complaint, and dismissed Count II, the pendent state claim, without consideration of its merits.

Respondents timely filed their Notice of Appeal, failing however, to set forth the names of all Plaintiffs in that notice merely referring in the caption to "Robin Akins, et al."

On appeal, the Court of Appeals for the Seventh Circuit, pursuant to its long-standing practice, that notices of appeal are entitled to a liberal construction where the intent of the appellants is apparent and the adverse party is not prejudiced, held that the Notice of Appeal was sufficient to apprise Petitioners that all Plaintiffs were appealing from the dismissal of the case. The Court specifically noted that "the defendants make no representation of surprise or prejudice."

In considering the merits of the appeal, the Court of Appeals held that the District Court had been mistaken in holding that Respondents had waived their claim against the defendants in their official capacity for prospective in-

junctive relief. It therefore reversed the dismissal of the case, and remanded to the District Court for further consideration. In so doing, the Court of Appeals specifically noted that the District Court had not passed upon whether the Complaint stated a cause of action, and directed that the District Court do so, specifically stating that "the question of the sufficiency of the complaint should be addressed in the first instance by the district court." In a footnote, the Court noted that the District Court has summarily dismissed the pendent claim, "apparently because it had dismissed the federal claim in its entirety." It therefore ordered that count be reinstated as well.

REASONS FOR DENYING THE WRIT

I.

THIS CASE DOES NOT PRESENT A SUBSTANTIAL ISSUE AS TO THE RETROACTIVITY OF THIS COURT'S NEWLY ANNOUNCED RULE IN *TORRES v. OAKLAND SCAVENGER COMPANY.*

The decision of the Court of Appeals for the Seventh Circuit in this case was handed down on March 4, 1988. As noted above, in that decision the Court held that the Notice of Appeal, although not naming each of the Plaintiffs individually, was sufficient to place Petitioners on notice that all plaintiffs were appealing the dismissal of their Complaint, even though they were merely described as "Robin Akins, et al." Subsequently, on June 24, 1988, this Court issued its decision in *Torres v. Oakland Scavenger Company*, ____ U.S. ____, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), holding that a party whose name is omitted from a Notice of Appeal has not complied with the provisions of Rule 3(c), Federal Rules of Appellate Procedure.

As was noted by this Court in *Torres*, and acknowledged by Petitioners in their Petition for Certiorari, prior to this Court's decision in *Torres*, there was a conflict in the circuits "over whether a failure to file a notice of appeal in accordance with the specificity requirement of Federal Rule of Appellate Procedure 3(c) presents a jurisdictional bar to the appeal." *Torres v. Oakland Scavenger Company, supra.*

Since the decision of the Court of Appeals in this case was issued nearly four months prior to this Court's decision in *Torres*, the issue presented by this case must necessarily be whether the ruling in *Torres* is retroactive.

In holding that the Notice of Appeal filed by these Respondents was sufficient, the Court of Appeals followed its long-standing position on the issue, as previously enunciated in *Scherer v. Kelley*, 584 F.2d 170 (7th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979). As noted by the Court of Appeals, "throughout the litigation in the district court, the plaintiffs had been represented by the same attorney and had presented precisely the same contentions." And, as indicated earlier, Petitioners had made no claim of prejudice.

Thus, the issue which would be presented to this Court is whether the Court of Appeals' reliance upon its previous practice of liberally construing Notices of Appeal should be set aside because this Court has subsequently concluded that such an approach is inappropriate. We must first note that a ruling on this issue will have an extremely limited application. It will apply only to those cases which are now pending on appeal, in those circuits which had taken the same approach as the Seventh Circuit. Since this Court has now spoken definitively on the issue in *Torres*, all potential appellants are put on notice of the specificity requirements of Rule 3(c), Federal Rules

of Appellate Procedure. Little purpose would be served by requiring dismissal of appeals of appellants such as Respondents who had inartfully prepared their Notice of Appeal prior to that decision.

Respondents and the Court of Appeals relied upon the prior policy of the Seventh Circuit. As this Court has stated, new procedural rules should not be applied retroactively where a view, even though mistaken, is supported by respectable authorities, including the Court below. *England v. Louisiana Medical Examiners*, 375 U.S. 411, 422, 84 S.Ct. 461, 11 L.Ed.2d 440, 449 (1964). There is no hard and fast rule of retroactivity, even in constitutional cases. *Linkletter v. Walker*, 381 U.S. 618, 629, 85 S.Ct. 1731, 14 L.Ed.2d 601, 608 (1965). As this Court has recently reaffirmed, federal cases should be decided in accordance with the law existing at the time of decision. *St. Francis College v. Al-Khazraji*, ____ U.S. ____, 107 S.Ct. 2022, 95 L.Ed.2d 582, 589 (1987). The decision of the Court of Appeals in this case was in accordance with its existing precedent at the time. Nothing appears in the record in this case, which is still at the pleading stage, which would indicate a departure from that rule.

The form of the Notice of Appeal in this case, and the effect given it by the Court of Appeals for the Seventh Circuit does not present the type of issue which would merit this Court's grant of a Writ of Certiorari.

II.

THE ISSUE OF PENDENT JURISDICTION IS NOT RIPE FOR ADJUDICATION IN THIS CASE.

Petitioners have asserted in their Petition for Writ of Certiorari that the Court of Appeals has stripped the District Court of its discretion to decide whether pendent jurisdiction should be exercised over them personally for

state law claims. A reading of the decision of the Court of Appeals makes it clear that the Court of Appeals has done nothing of the kind.

As noted by the Court of Appeals, it reversed the dismissal of this case because the District Court seemingly did not understand the issues before it. The magistrate to whom the motion to dismiss was first referred recommended that the motion be denied against the defendants in their official capacities insofar as the complaint sought prospective injunctive relief. The magistrate further determined that the individual defendants (petitioners here) were entitled to qualified immunity from monetary damages because the right sought to be asserted was not clearly determined as of the time of the acts alleged. The magistrate further recommended that the motion to dismiss Count II of the Complaint, which raised purely state law claims for damages, be denied as well.

The District Court, while purporting to adopt the recommendations of the magistrate, in reality rejected those recommendations. It dismissed the case in its entirety, based upon the finding that Plaintiffs had abandoned their claim for injunctive relief.

In reversing, the Court of Appeals essentially reinstated the recommendations of the magistrate. It agreed that the defendants were entitled to qualified immunity in their individual capacities. It reversed the holding of the District Court that Plaintiffs had abandoned their claim for injunctive relief against the defendants in their official capacities, and reversed for further proceedings. Since the District Court had not decided whether the Complaint stated a claim upon which relief could be granted, the Court of Appeals directed the District Court, on remand, to consider whether the Plaintiffs had in fact stated a cause of action. In passing, the Court of Appeals noted

that since Count II of the Complaint, which set forth a pendent state claim, had been dismissed by the District Court without any consideration of its merits, that count should be reinstated as well. *Akins v. Board of Governors of State Colleges and Universities*, 840 F.2d 1371 (7th Cir. 1988).

Petitioners argue to this Court that by directing the reinstatement of the pendent claim, as well as the reinstatement of the claim brought pursuant to 42 U.S.C. Section 1983, the District Court has been deprived of its discretion to decide whether the pendent claim ought to proceed or not. It is obvious that the Court of Appeals intended only to reinstate the pleading, so that the District Court could fully consider whether it properly stated a claim for relief. Thus, upon remand, the issues as to whether the complaint states a claim, and whether the individual defendants may be sued in their individual capacity under the pendent state claim are still open for consideration by the District Court. The issues sought to be raised by Petitioners here have yet to be decided by the District Court.

In short, this issue is not ripe for consideration by this Court. Neither the District Court nor the Court of Appeals has determined whether Plaintiffs have stated a claim. If, on remand, it is decided that no claim has been stated under 42 U.S.C. Section 1983, the issue of pendent jurisdiction over the state claims will evaporate. Only if it is decided that a claim is stated will the pendent claim issue need to be addressed.

If the District Court determines that the federal claim is valid, it will then be required to decide whether the pendent state claim should be entertained by it. At that juncture, it will be free to exercise its discretion in deciding that issue. At this stage, however, that question

still remains open. It has not been decided by either court below. The record in this case does not present the pendent jurisdiction issue in a manner which makes it appropriate for consideration by this Court.

CONCLUSION

This case presents no issues which are either worthy for review or ripe for review by this Court. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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